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SUPREME COURT, U.S.

No. 06-173

IN THE

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

CONSOLIDATED REPLY BRIEF OF PETITIONER TO PHELPS DODGE INCORPORATED, ET AL. BRIEFS IN OPPOSITION

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PETITIONER'S CONSOLIDATED REPLY BRIEF

Petitioner, the San Carlos Apache Tribe ("Apache Tribe" or "Tribe") submits this Consolidated Reply to the Responses in Opposition to the Tribe's Petition filed by Phelps Dodge Corporation ("Phelps Dodge"), the City of Safford ("Safford"), and the Gila Valley Irrigation District and Franklin Irrigation District ("GVID") (collectively "respondents").[1]

A. The Decision below Constitutes a "Final Judgment" under 28 U.S.C. § 1257(a)

The United States agrees with Petitioner that the decision below constitutes a "final judgment" for purposes of this Court's jurisdiction under 28 U.S.C. § 1257(a).[2] Only Safford argues that because the Tribe's claims to the "tributary waters" of the Gila River remain to be adjudicated in Arizona's stream adjudication, the decision of the Arizona Supreme Court regarding the Tribe's claims to the **mainstream** of the Gila River is not "final" for purposes of this Court's review.[3] Safford is wrong.

The decision below is final and plainly severable from the Tribe's remaining water rights claims to the tributaries of the Gila River. In the decision below, the Arizona Supreme Court expressly precluded the Apache Tribe and the United States as its trustee from ever **asserting or proving** any federal reserved, aboriginal, or other water rights claims to the mainstream of the Gila River. As far as the State stream adjudication is concerned, these claims have been effectively and finally "adjudicated." Additional water from the mainstream is now unavailable to meet the needs of the Apache Reservation as a "permanent Tribal homeland."

The Gila River mainstream runs through the very heart of the Reservation. It is the single most valuable source of water

1. The Apache Tribe has filed separate replies to the Response in Opposition filed by the United States and the Response in Opposition filed by ASARCO, LLC.

2. United States Response in Opposition ("U.S. Resp.") at 9.

3. Brief in Opposition for Respondent City of Safford ("Safford Resp.") at 9-10.

in the region, and unlike the tributaries, it is located near all of the Apache Tribe's population centers, major highways, electrical lines, farmlands and infrastructure, and has the longest growing season on the Reservation. However, as a result of the ruling below, the Tribe is foreclosed **today** from diverting any of the waters of the mainstream, except for the annual irrigation of 1,000 acres of land under the *Globe Equity Decree*.[4] This ruling is final and has no chance of being reversed or otherwise corrected by any decision on the Tribe's claims to the tributaries. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). This Court has jurisdiction under 28 U.S.C. § 1257(a).

B. *Arizona v. San Carlos* Required the Federal Reserved, Aboriginal, and Other Water Rights Claims for the Apache Reservation to be Adjudicated in Arizona's Stream Adjudication

Fundamental protections of due process entitle the Tribe to defend against the respondents' use of *res judicata* as "sword" to eviscerate the Apache Tribe's right to adjudicate its water right claims to the Gila River mainstream. However, respondents deliberately mischaracterize the Apache Tribe's constitutionally protected due process rights to defend itself from the affirmative defense of *res judicata* as an "attack" on the *Globe Equity Decree* (or sometimes as a "claim" of inadequate representation). A similarly erroneous tact was employed by the Arizona Supreme Court in its decision below on "comity."[5]

4. *See* Apache Tribe Appendix to Petition for Certiorari, No. 06-173 ("App.") at 31a-47a. This is in contrast to the many thousands of non-Indian claimants whom have yet to have a single claim adjudicated in Arizona's stream adjudication.

5. The Arizona Supreme Court also characterized the Tribe's defense to *res judicata* as an "attack" on the *Decree*, and then speculated, without the aid of briefing or an evidentiary record adduced from a trial on the merits, that the Tribe made a "strategic decision" not to raise its unadjudicated claims to the Gila River mainstream when it intervened in *Globe Equity* in 1990. This conclusion was based on an unrelated ruling made by the *Globe Equity* court in 1983 involving the Gila River Indian Community ("GRIC"). The inapplicability of GRIC's 1983 ruling (Cont'd)

Having mischaracterized the Apache Tribe's defense to *res judicata* as an "attack" or "claim", respondents then argue that the Tribe should have filed its "claim" for inadequate representation (or leveled its purported "attack" on the *Decree*) in the federal *Globe Equity Court* when, in 1990, it intervened to enforce the *Decree* against upstream pumping.[6] Finally, so the argument goes, because the Tribe **did not** present the *Globe Equity Court* with this opportunity when it intervened in 1990, the Tribe is **now** barred from defending against *res judicata* in Arizona's stream adjudication. This argument deliberately misunderstands the history of this case and the holding of this Court in *Arizona v. San Carlos*.

Over the vigorous objections of the Apache Tribe and others, this Court directed the United States in 1983 to file all of its water rights claims for Indian tribes in Arizona, including the Apache Reservation, in the State stream adjudication,[7] and required that **all questions** regarding the water rights claims for the Apache Reservation be litigated in a "comprehensive" McCarran Amendment proceeding. Both the United States and the Apache Tribe filed separate claims for federal reserved,

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(Cont'd)
in *Globe Equity* to the Apache Tribe is discussed in the Tribe's Reply to the Response in Opposition filed by ASARCO, L.L.C. The Tribe does not restate this argument here.

6. *See* Motion to Intervene, May 25, 1990, attached here as Appendix A.

7. Understanding that it was the State's strategy to capture jurisdiction over the water rights claims by and for the Apache Tribe for adjudication in the State's nascent stream adjudication, the Apache Tribe filed original actions in **federal court** in 1979 seeking to adjudicate the Tribe's federally protected water rights for its Reservation. On review by this Court, the Apache Tribe (along with several other Indian tribes) argued, *inter alia*, that an adjudication of their federally protected water rights could be completed more rapidly, fairly, and competently in federal court. The Apache Tribe and others also explained that federal courts were at least perceived to be less likely to engage in the discriminatory practices against Indians which have historically plagued Arizona's court system.

aboriginal and other water rights to, *inter alia*, the mainstream of the Gila River on November 1, 1985, pursuant to the final deadlines issued by the State adjudication court.

Significantly, when the Apache Tribe's claims were filed in 1985, the Tribe's opponents did not then allege that the *Globe Equity Decree* precluded the claims of the Tribe or the United States to the mainstream of the Gila River under principles of *res judicata*.[8] The Tribe and the United States simply had no reason in 1985 to doubt that they were entitled under all principles of law and equity and this Court's decisions in *United States v. Winans*, 198 U.S. 371 (1904) and *Winters v. United States*, 207 U.S. 564, 565 (1908), to file water rights claims to the Gila River mainstream, regardless of the very nominal right previously decreed to the United States in *Globe Equity*.[9] Indeed, the United States' Statement of Claim filed on the same day as the Apache Tribe, confirmed the Apache Tribe's view of these matters, since the United States also included a claim for substantial additional water rights to the Gila River mainstream for the Apache Reservation.[10]

By 1990, when the Tribe intervened in *Globe Equity* on its own behalf, the defense of *res judicata* **still** had not been raised by the Tribe's opponents,[11] and the Tribe was not aware of any

8. If the respondents intended to preclude the Tribe from claiming rights to the Gila River mainstream, they could have raised this argument when the Tribe filed its original actions for the adjudication of its water rights in federal court in 1979. They did not.

9. Indian tribes are entitled to rely upon the good faith of the United States, and to assume that in the exercise of its role as trustee, the government acted for the Tribe's benefit. *See United States v. Mitchell*, 463 U.S. 206, 225-26 (1983).

10. The United States' Statement of Claimant filed November 1, 1985, claimed more than 209,643 acre-feet of water per year from the Gila River mainstem. *See* Supplemental Appendix to Apache Tribe's Petition for Certiorari, No. 06-173 ("Supp. App.") at 68-102.

11. In fact, the Tribe's opponents delayed asserting the affirmative defense of *res judicata* for almost 16-years, and even then, only raised *res judicata* because the State adjudication court invited this approach (Cont'd)

purported basis or need for it to "attack" the *Decree*, even though very substantial water rights claims to the mainstream of the Gila River for the Tribe had been pending in the Arizona's stream adjudication for over five years.[12] The Tribe made this point expressly clear to the *Globe Equity Court* and these respondents in its Motion to Intervene, dated May 25, 1990, where it candidly stated:

> None of the above allegations seek to vacate the Decree, or re-litigate issues. The APACHE TRIBE does not

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(Cont'd)
in an Order entered on August 24, 1999 (App. 278a). In accordance with this invitation, respondents finally filed motions for summary judgment asserting, *inter alia*, the affirmative defense of *res judicata* on March 28, 2001. This Court has rejected untimely assertions of *res judicata* in the past, including in *Arizona v. California*, 530 U.S. 392, 393 (2000):

> The State parties could have raised the defense in 1979 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation. The State parties did not so then, nor did they raise the objection in 1982 when *Arizona II* was briefed and argued. Unaccountably, they raised the preclusion argument for the first time in 1989, when they initiated the current round of proceedings. **The State parties had every opportunity, and every incentive, to press their current preclusion argument at earlier stages in the litigation, yet failed to do so * * * * We disapprove of the notion that a party may wake up because a "light finally dawned," years after the first opportunity to raise a defense, and effectively raise it** so long as the party was (through no fault of anyone else) in the dark until its late awakening. (Emphasis added) (Internal citations omitted).

12. The United States explained in its Response Brief:

> While petitioner was free to defend its *existing* rights under the Globe Equity Decree in the court that entered the Decree, this Court's *San Carlos* decision permitted petitioner to claim *additional* rights only in this state-court litigation. The Arizona Supreme Court therefore erred in holding that petitioner had voluntarily "declined to adjudicate its 'inadequate representation' claim" in the Globe Equity court. (Italics in original).

> seek to litigate rights to additional Gila River water in this matter, and no allegations have been made in the proposed Complaint in Intervention regarding *Winters* water rights. However, the APACHE TRIBE has been and will continue to litigate its claims to federally reserved *Winters* water rights in State Court in the State of Arizona "Gila River Adjudication" matter ... which is now pending in Maricopa County Superior Court before the Hon. Stanley Z. Goodfarb.

Even after the Tribe's opponents attacked the Tribe's claims to the Gila River mainstream using the "sword" of *res judicata*, the Tribe continued to make clear that it was **not** seeking to upset or invalidate the *Decree*. The Tribe simply argued that the United States, acting in "good faith", could not have intended to adjudicate the Apache Tribe's federally protected water rights to the mainstream of the Gila River in the *Decree*, or **alternatively**, that there was no "privity" between the United States and the Tribe in *Globe Equity*, as such term is defined as a necessary element of *res judicata*, because the United States failed to adequately represent the Tribe in *Globe Equity*.

In short, the Tribe's challenge to the adequacy of the United States' representation, raised as a shield **in defense** of a *res judicata* attack on its water rights claims, was in no way a "strategic choice" to levy an impermissible collateral attack on the *Globe Equity Decree* in the State adjudication, rather than in the federal *Globe Equity Court*.[13] This Court directed in *Arizona v. San Carlos* that all water rights claims for the Apache Reservation must be adjudicated in Arizona's stream adjudication. Having done as instructed, the Tribe was acutely aware that it could not then seek to adjudicate these very same claims (or any issue necessary for the adjudication of such

13. Ironically, had the Apache Tribe attempted to return to the *Globe Equity Court* to "attack" the *Decree* on inadequate representation grounds in 1990, there can be little doubt its opponents would have called such an "attack" premature, noting that both the Tribe and the United States still had claims for additional water rights to the mainstream of the Gila River pending in Arizona's stream adjudication.

claims) in the federal *Globe Equity Court*, as this would result in the "piecemeal" adjudication this Court had previously determined violated the McCarran Amendment.

C. *Nevada* and *Arizona v. California* Have Not Rejected the Defense of Inadequate Representation

Respondents do not cite to any case in which this Court has held that the defense of inadequate representation **cannot** be asserted by an Indian tribe confronted with the affirmative defense of *res judicata* in a water rights adjudication. Respondents' strained interpretation of this Court's decisions in *Nevada v. United States*, 463 U.S. 110 (1983) and *Arizona v. California*, 460 U.S. 605 (1983) ("*Arizona II*") do not change this fact.[14]

In *Nevada*, the Pyramid Lake Paiute Tribe ("Paiute Tribe") **did** assert the defense of inadequate representation in the trial court, and the trial court held a 43-day trial to examine the factual issues surrounding the United States' representation of the Paiute Tribe in the earlier proceeding, know as the "*Orr Ditch*" litigation.[15] On appeal, the Ninth Circuit ruled that the Paiute Tribe **was** entitled under constitutional protections of due process to **raise** the defense of inadequate representation as a matter of law against those who asserted the *Orr Ditch* decree as preclusive of the Paiute Tribe's additional claims for a Tribal fishery, though the Ninth Circuit went on to hold that the Paiute Tribe had failed to prove as a **factual** matter that the government

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14. Respondents make much of this Court's decision in *Heckman v. United States*, 224 U.S. 413 (1912). However, this case merely stands for the unremarkable proposition that where the United States is authorized to represent Indian allottees in litigation, even where the tribe or allottee is **not** joined by the United States as a necessary party in such litigation, the United States has the authority to bind the allottees to a judgment under principles of *res judicata*. *Heckman* does not mean, however, that the burden of proving the elements of *res judicata* have been abandoned when it comes to Indians, or that tribes have been stripped of their due process rights to defend against those who would assert that existence of "privity" between the United States and the Tribe in a prior action in which the Indian tribe was not a party.

15. The Apache Tribe was denied any opportunity to prove its defenses to *res judicata* in a trial on the merits.

had inadequately represented the Tribe in *Orr Ditch*. *See U. S. v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1306-1307 (9th Cir. 1981), *modified at* 666 F.2d 351 (9th Cir. 1982). Contrary to the assertions of respondents, however, the Ninth Circuit's ruling as to inadequate representation was never appealed to this Court in *Nevada*.

What was appealed and ultimately rejected by this Court in *Nevada* was the Paiute Tribe's claim that the United States had a *per se* "impermissible conflict of interest" in representing both the Tribe and non-Indian irrigation district throughout the *Orr Ditch* litigation. This Court reasoned that since the United States is typically required to represent varied interests in comprehensive water rights adjudications, it would be unreasonable to hold the United States to a **strict** standard of a fiduciary in all instances, and thus, there could be no *per se* impermissible conflict of interest arising out of the United States' mere representation of varied interests in *Orr Ditch*.[16]

In contrast to the United States' conduct in *Orr Ditch*, the United States negotiated the *Globe Equity Decree* in the face of an **actual** conflict of interest wherein the Secretary of Interior disregarded any fiduciary obligation to the Tribe in favor of a clear pattern of self-dealing designed (successfully) to further the interests of the Secretary's own project, the San Carlos Irrigation Project ("SCIP"), all to the profound and very real detriment of the Tribe.[17] Thus, this is not a case in which the Apache Tribe asserts the existence of *per se* "conflict of interest" based merely on the fact that the United States in *Globe Equity* "carried water on at least two shoulders." *Nevada*, 463 U.S. at 128, 141. Here, the conflict was real and pervasive, and resulted in an almost complete abandonment of the Apache Tribe's federally protected water rights claims to the mainstream of the

16. *Nevada*, 463 U.S. at 128, 135.

17. Although the construction of SCIP on the Apache Reservation destroyed many of the Tribe's homes, graves, farms, and gardens, the Tribe was not included in the SCIP, and it received no benefits from the SCIP.

Gila River in the *Decree*.[18] The *Decree* simply cannot, consistent with due process, be asserted as preclusive of the Tribe's claims in this instance, as such conduct destroys the element of privity between the United States and the Tribe necessary for *res judicata* to be applied

Finally, respondents are also wrong to argue that this Court's decision in *Arizona II*, bars the Tribe's inadequate representation defense. In fact, in *Arizona II*, this Court tacitly **acknowledged** the viability of the inadequate representation defense, when it examined each of the legal elements of this defense, but nevertheless determined as a **factual matter** that the Colorado River tribes, having been decreed hundreds of thousands of acre feet of water, had been more than adequately represented in the prior proceeding:

> [W]e have no indication that the Government's representation of the Tribe's interests with respect to the amount of practicably irrigable acreage was **legally inadequate**. Indeed, the substantial water allocation awarded the Tribes reflect the competency of the United States' representation. We believe that the issue of

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18. In rejecting a *per se* rule based upon an apparent conflict of interest arising out of the United States' dual representation in *Nevada*, this Court also found important the fact that during the *Orr Ditch* litigation, the Bureau of Indian Affairs ("BIA") and its attorneys represented the Paiute Tribe, while the Bureau of Reclamation and its attorneys separately represented the non-Indian irrigation district. Therefore, even though the claims for the Paiute Tribe and the irrigation district competed with each other, in theory, they receive adequate representation through each of these different sets of government attorneys and representatives. *Id.* at 135-137. In contrast, in *Globe Equity*, the same government attorneys not only represented the varied federal interests of the United States and its Project, the SCIP, as well as GRIC and the San Carlos Irrigation and Drainage District, but also purported to represent the Apache Tribe, whose federally protected water rights seriously conflicted with the water rights for SCIP and the other beneficiaries of the Project.

practicably irrigable acreage was fully and fairly litigated in 1963.[19]

The respondents, here, cannot point to any "substantial water allocation" awarded to the Apache Tribe in the *Globe Equity Decree*.[20] Regardless of how respondents characterize this Court's holdings in *Nevada* and *Arizona II*, neither case ruled that the United States is free to act under an actual conflict of interest and simply serve itself to the water which it should have protected for its beneficiary, the Apache Tribe. In such circumstances, the defense of inadequate representation must remain under fundamental principles of due process.

CONCLUSION

The Apache Tribe respectfully requests that the Court issue a writ of certiorari to the Arizona Supreme Court on the two Issues presented in the Tribe's Petition.

Respectfully submitted,

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19. *Arizona II*, 460 U.S. at 628 & n.21 (emphasis added).

20. This Court in *Arizona II* also acknowledged that an **actual** conflict of interest might preclude the application of *res judicata*, where it observed:

> **In this case, there is no demonstration that the United States, as a fiduciary, was involved in an actual conflict of interest**. From the initiation of this case, the Government has taken seriously its responsibility to represent the Tribes' interests . . . . *Arizona II*, 460 U.S. at 627 (emphasis added).

APPENDIX

APPENDIX — MOTION TO INTERVENE AS PLAINTIFF OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA DATED MAY 25, 1990

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

GLOBE EQUITY NO. 59 (JCC)

(Oral Argument Requested)

UNITED STATES OF AMERICA,

Plaintiff,

and

GILA RIVER INDIAN COMMUNITY,

Plaintiff in
Intervention,

vs.

GILA VALLEY IRRIGATION DISTRICT, et. al.,

Defendants.

MOTION TO INTERVENE AS PLAINTIFF

The San Carlos Apache Tribe, (herein "the APACHE TRIBE"), by and through counsel undersigned, hereby moves this Court for leave to intervene in the above captioned matter pursuant to Rule 24(a)(2), Rules of Civil Procedure, as a Plaintiff in the above-captioned matter to assert the claims set forth in

the proposed Complaint in Intervention attached hereto as Exhibit 1, on the grounds that the APACHE TRIBE has the right to intervene. Alternatively, the APACHE TRIBE submits that the Court has the discretion to allow the APACHE TRIBE to intervene pursuant to Rule 24(b), Rules of Civil Procedure.

This Motion is based upon the following Memorandum of Points and Authorities, and all pleadings, motions and other documents of record in this action. The original Complaint in Intervention is tendered to the Clerk of the Court for filing if ordered by the Court.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 24(a)(2), Rules of Civil Procedure, provides as follows:

> Upon timely application anyone shall be permitted to intervene in an action ... (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

The APACHE TRIBE respectfully submits that it has the right to intervene to assert the claims set forth in the proposed Complaint in Intervention under Rule 24(a)(2). The right to intervene is mandatory if the two conditions of Rule 24(a) (2) are satisfied; otherwise it is discretionary under Rule 24(b). The two relevant grounds for intervention under Rule 24(a) (2) are: (1) that the applicant claims an interest relating to the property which is the subject of the action; and (2) that the applicant's

interest may as a practical matter be impaired unless the applicant is adequately represented by existing parties.

The APACHE TRIBE's grounds for intervention under Rule 24(a)(2) are therefore two-fold. First, the APACHE TRIBE alleges that its water rights granted to it under the Decree have been violated and are not being enforced, and that these allegations are the subject of the Court's continuing jurisdiction to enforce the Decree in this matter. Second, the APACHE TRIBE alleges that unless it is allowed to represent itself, its interests may as a practical matter be impaired.

A. The APACHE TRIBE Claims An Interest In The Waters Of The Gila River Which Is The Subject Matter Of This Litigation.

The APACHE TRIBE's rights under the Decree to divert Gila River water for irrigation purposes and to otherwise use and enjoy the "natural flow" of the Gila River through the Reservation have not been properly enforced by the Water Commissioner, and such rights have been violated by the Defendants who unlawfully divert, use, and pump Gila River water upstream from the San Carlos Apache Reservation (herein, "the Upper Valley Defendants"). Such water rights of the APACHE TRIBE are protected by the Decree, and are subject to enforcement by the Court through the exercise of its continuing jurisdiction in the above-captioned matter.

Under paragraph XII of the Decree filed in this matter on June 29, 1935 (herein "the Decree"), the Court may review the actions or orders of the Water Commissioner, and may make such orders as are proper in the premises. Under paragraph XIII of the Decree, the parties have been enjoined from violating any terms of the Decree, and the Court may enforce the rights of the parties under the terms of the Decree through the exercise of its continuing jurisdiction in this matter.

Appendix

The Court in Globe Equity No. 59 has traditionally exercised continuing jurisdiction throughout the years to resolve matters affecting the enforcement of the water rights granted to the parties under the terms of the Decree, and to interpret such rights under the Decree. For example, see *Gila Valley Irr. Dist v. U.S.*, 118 F.2d 507 (9th Cir., 1941) ("stored" water does not include all water flowing into the San Carlos Reservoir); *Brooks v. U.S.*, 119 F.2d 636 (9th Cir., 1941) (U.S. District Court in Arizona had jurisdiction to decide relative rights of New Mexico water users to the Gila River); and *United States v. Gila Valley Irrigation District*, 454 F.2d 219 (9th Cir., 1972) (Lower Valley Users as a compromise waived certain water priorities to Upper Valley Users in favor of limited use by Upper Valley Users). In 1983, this Court allowed the Gila River Indian Community to intervene and file a Complaint alleging violations of the Decree by the parties.

The proposed Complaint in Intervention alleges claims which are similar in nature to those types of claims that the Court has determined in the past, or which are presently pending before the Court. Thus, the proposed Complaint in Intervention in general alleges that the APACHE TRIBE has certain water rights granted to it under the terms of the Decree, and that the Water Commissioner has failed to enforce and protect its rights, and that the Upper Valley Defendants have violated its water rights under the Decree. The APACHE TRIBE alleges that it therefore has been unable to divert water for irrigation purposes, or to otherwise use and enjoy the natural flow of the Gila River water through the San Carlos Apache Reservation (herein, "the Reservation").

Summarizing the allegations, the APACHE TRIBE alleges in Count One of the proposed Complaint in Intervention, that the Upper Valley Defendants divert Gila River water in violation of the APACHE TRIBE's superior rights as set forth in the

Decree, because paragraph VIII of the Decree does not apply to the APACHE TRIBE, but only applies to parties who are allowed by the Decree to divert Gila River water downstream from the Reservation (herein, "the Lower Valley Users").

Count Two alleges that that the Upper Valley Defendants unlawfully divert Gila River water because their diversions exceed the amount of water apportioned to them by the Water Commissioner under the terms of paragraph VIII of the Decree.

Count Three alleges that the Water Commissioner's method of apportioning Gila River water on the first of each year is improper because apportionments based on stored water available for release may be carried over from year to year.

Count Four alleges that there is now "a lack of available stored water" in the Reservoir within the meaning of the terms of the Decree for any new apportionments to be made by the Water Commissioner for the Upper Valley Defendants.

Count Five alleges unlawful diversions and use of the Gila River by the Upper Valley Defendants including their practice of diverting Gila River water to recharge their aquifers and wells, and then pumping the water for irrigation purposes when needed at a later time.

Count Six alleges that the Upper Valley Defendants pump Gila River water from wells in which the water is hydrologically connected to the natural flow of the Gila River and which reduces or interrupts such flow. Count Six contains allegations which are similar to Count Eight of the Gila River Indian Community's Amended Complaint in Intervention, and Count Eight is now pending before the Court for Pretrial Orders.

Finally, Count Seven alleges that the Upper Valley Defendants have interfered with the use and enjoyment of the Gila River by degrading the quality of the Gila River.

All of the above allegations are within the continuing jurisdiction of this Court in this matter to review, and to make orders for the enforcement of the terms of the Decree as the Court deems proper.

None of the above allegations seek to vacate the Decree, or re-litigate issues. The APACHE TRIBE does not seek to litigate rights to additional Gila River water in this matter, and no allegations have been made in the proposed Complaint in Intervention regarding *Winters* water rights. However, the APACHE TRIBE has been and will continue to litigate its claims to federally reserved *Winters* water rights in State Court in the State of Arizona "Gila River Adjudication" matter captioned *In The General Adjudication of All Rights to Use Water in the Gila River System and Source,* W-1 (Salt), W-2 (Verde), W-3 (Upper Gila), W-4 (San Pedro), which is now pending in the Maricopa County Superior Court before the Hon. Stanley Z. Goodfarb.

Thus, the APACHE TRIBE in the proposed Complaint in Intervention, seeks only the enforcement of its water rights granted under the terms of the Decree which is the subject matter of the Court's continuing jurisdiction in this matter.

The APACHE TRIBE urges the Court to grant its Motion to Intervene and to exercise its continuing jurisdiction to decide the matters alleged in the APACHE TRIBE's proposed Complaint in Intervention. The Court has subject matter jurisdiction over all the lands and interests in lands and other property rights and personal jurisdiction over all of the necessary parties to adjudicate the claims asserted in the proposed Complaint in Intervention.

The Court should therefore allow intervention if it believes that the APACHE TRIBE's interests are not adequately represented by the United States in this matter at least for purposes of Rule 24(a)(2).

B. The APACHE TRIBE's Interests Are Not Adequately Represented By The United States In Globe Equity No. 59 for Purposes of Rule 24(a)(2).

The APACHE TRIBE's interests in the waters of the Gila River will continue to be impaired unless the APACHE TRIBE is allowed. to intervene and represent itself. While the United States purports to represent the APACHE TRIBE's interests in this matter as trustee for the APACHE TRIBE, such representation in the past has proven to be inadequate. For example, the United States agreed in the Decree as trustee for the APACHE TRIBE, but without its consent, that the APACHE TRIBE would only be entitled to divert 6,000 acre feet of water for irrigation purposes, rather than the 18,000 acre feet of water that the United States had alleged the APACHE TRIBE was entitled to receive based upon historical use.

Furthermore, while the United States reserved storage space for water behind Coolidge Dam for the lands of the San Carlos Irrigation Project downstream from the Reservation, the United States, although it had the power to do so, never reserved any storage space for water behind Coolidge Dam for the APACHE TRIBE. The United States has never adequately represented the APACHE TRIBE with respect to the APACHE TRIBE's unique interests in this matter since 1935.

The APACHE TRIBE does assert claims unique to its interests in the proposed Complaint in Intervention because (1) the APACHE TRIBE is neither an "Upper Valley User", nor a "Lower Valley User", unlike every other party in this matter; and

(2) the APACHE TRIBE's rights to use the Gila River for irrigation purposes, and to use and enjoy the natural flow of Gila River through the Reservation, are not subject to any diversion rights of the Upper Valley Defendants under paragraph VIII of the Decree, as alleged in Count One of the proposed Complaint in Intervention.

Courts have uniformly allowed an Indian Tribe to intervene to represent itself where the Indian Tribe has alleged inadequate representation by the United States, especially where there is the potential for a conflict of interest in such multiple client representation. The United States has already conceded that such a conflict may exist in this matter when it responded to the Motion of the Gila River Indian Community to intervene in this matter. In *Arizona v. California,* 460 U.S. 605, 613-615, 103 S.Ct. 1382 (1983), the U.S. Supreme Court held that the Indian Tribes affected by the adjudication were entitled to intervene and represent themselves regarding the allocation of rights to the waters of the Colorado River.

The Order of the Court in this matter dated May 2, 1983, allowed the Gila River Indian Community to intervene and expressly recognized the right that an Indian Tribe has to represent itself:

> Upon reviewing the parties' contentions in light of the relevant case law, I conclude that for the purposes of Fed. R. Civ. P. 24(a)(2), GRIC [Gila River Indian Community] has made a sufficient showing of inadequate representation. As the court recently stated in *Arizona v. California,* 51 U.S.L.W. at 4328 [460 U.S. 605, 103 S.Ct. 1382], in reviewing certain exceptions taken to the Special Master's Report, it was proper to permit intervention in this kind of case because the Indians ought to be allowed "to take

> their place as independent qualified members of the modern body politic" and their "participation in litigation critical to their welfare should not be discouraged" (citations omitted). The court, therefore, agreed with the Special Master that the motions to intervene ought to be granted. [at p. 9].

A conflict in interest invariably arises in "stream adjudication" cases when the United States attempts to represent different parties like the Secretary of Interior (Bureau of Reclamation or Bureau of Indian Affairs), and an Indian Tribe, where each of the parties have conflicting interests and claims to the same water. *Pyramid Lake Paiute Tribe of Indians v. Morton,* 354 F. Supp. 252 (D.C. Dist. 1972).

In this matter, there exists the potential for a conflict of interest between the United States' interests and that of the APACHE TRIBE to the waters of the Gila River, and the parties should therefore have the right to have their own legal counsel represent them.

For all of the above reasons, the APACHE TRIBE therefore respectfully submits that the Court find that the APACHE TRIBE's interests are not adequately represented by the United States for purposes of allowingintervention under Rule 24(a)(2).

C. The APACHE TRIBE Has The Right To Intervene In Globe Equity No. 59.

The APACHE TRIBE submits that it satisfies both conditions of Rule 24(a)(2), and that the Court should therefore grant the APACHE TRIBE leave to intervene in this matter, and file the proposed Complaint in Intervention. Alternatively, the APACHE TRIBE submits that it has satisfied the standards for permissive intervention at a minimum under Rule 24(b), Rules of Civil Procedure.

Appendix

In conclusion, the Court exercises continuing jurisdiction in this matter to enforce violations of the Decree by the parties to the Decree. The APACHE TRIBE has alleged meritorious claims against the Water Commissioner and the Upper Valley Defendants. Each year there is less water flowing in the Gila River and the quality of such water is degraded and polluted due to illegal diversions, use, pumping and other unlawful conduct by the Upper Valley Defendants. The filing of the proposed Complaint in Intervention is timely because the remedies sought include the restoration of a natural and adequate flow of the Gila River through the Reservation as provided for in the Decree. The APACHE TRIBE seeks only the proper enforcement of the Decree, and the parties are therefore precluded from complaining of any untimeliness or prejudice to them. *See* Order of this Court dated May 2, 1983 in which the Court held:

> To the extent that GRIC [Gila River Indian Community] seeks to enforce the Decree, however, Globe Equity No. 59 is still very much alive. The court retained jurisdiction to enforce the Decree. The continued viability of this aspect of the case is demonstrated by the currently pending action of the United States to enforce the Decree. The ongoing enforcement of the Decree naturally has an impact on GRIC's rights under the Decree. Undoubtedly, therefore, GRIC has rights to the water that is the subject of Globe Equity No. 59 that may be impaired or impeded if the Decree is improperly administered. [at p. 7].

Finally, the Court should grant leave to the APACHE TRIBE to intervene in this matter for the same reasons that the Court allowed the Gila River Indian Community to intervene in this matter in 1983.

WHEREFORE, the APACHE TRIBE requests that the Court allow it to intervene as a matter of right in this matter, or alternatively, as a matter of permission, and to file the Complaint in Intervention attached hereto as Exhibit 1.

Respectfully submitted this 25th day of May, 1990.

SPARKS & SILER, P. C.

s/ Joe P. Sparks

By s/ John H. Ryley
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